

NO. 48321-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

AZARIAH C. ROSS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth P. Martin, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied appellant Azariah Ross' CrR 3.5 motion to suppress incriminating statements obtained by police.
2. The trial court erred in ruling that a preponderance of the evidence showed that the appellant's statements were made pursuant to a knowing, voluntary, and intelligent waiver of his *Miranda*<sup>1</sup> rights.
3. The trial court erred in ruling that no evidence indicated that the appellant was under the influence of the drug Percocet and therefore was unable to knowingly, intelligently and understandably waive his *Miranda* rights.
4. The trial court failed to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c).
5. The convictions violated the appellant's Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
6. The convictions violated the appellant's state constitutional right under Wash. Const. Article I, Sections 3 and 22 to notice of the charges against him.
7. The Amended Information was deficient because it failed to set forth specific facts describing the appellant's alleged conduct.
8. Insufficient evidence supports the conviction for theft of a

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

firearm because the State failed to prove the alleged firearm was operable.

9. The trial court erred in denying the appellant's motion to dismiss the conviction theft of a firearm due to insufficient evidence.

10. The deputy prosecutor committed misconduct in closing argument, denying the appellant his right to a fair trial.

11. The convictions for six counts of unlawful imprisonment must be reversed because the restraints relied on for those convictions were incidental to the first-degree robbery and first-degree burglary.

12. The convictions for first degree robbery in Counts 8 and 9, and unlawful imprisonment in Counts 15 and 16 should have been treated as the same criminal conduct at sentencing and therefore the offender score was erroneously calculated.

#### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The State bears the heavy burden to prove a knowing, voluntary, and intelligent waiver of *Miranda* rights. Did the State fail to satisfy this burden where substantial evidence suggested that the appellant was intoxicated when he waived his rights and made inculpatory statements? Assignments of Error No. 1, 2, and 3.

2. The trial court ruled that there was no evidence to indicate that the appellant was not sufficiently coherent to waive his *Miranda* rights. Did the court err in so ruling where substantial evidence suggested that the

appellant was intoxicated when he waived his rights and made inculpatory statements? Assignment of Error No. 1, 2, and 3.

3. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Must this case be remanded for entry of the required findings and conclusions? Assignment of Error No. 4.

4. An accused person is constitutionally entitled to be informed of the charges against him. The charging document in this case did not outline the specific facts describing Azariah Ross' alleged conduct. Was he denied his constitutional right to adequate notice of the charges under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22? Assignments of Error No. 5, 6, and 7. Clerk's Papers (CP) 294-317.

5. Whether the Amended Information was deficient because it failed to include specific facts supporting the allegation that the appellant committed first degree robbery (Counts 8, 9, and 35), first degree burglary (Counts 12, 34), and unlawful imprisonment (Counts 15, 16, 38, 39, and 40). Assignments of Error No. 5, 6, and 7.

6. Whether the trial court erred in denying the appellant's

motion to dismiss the charges for five counts of unlawful imprisonment due to insufficient information? Assignments of Error No. 5, 6, and 7.

7. The State charged the appellant with theft of a firearm (Count 17). To prove theft of a firearm, the State must introduce facts from which the jury may find beyond a reasonable doubt that the item in question falls under the definition of a "firearm," that is, a weapon or device from which a projectile may be fired by an explosive such as gunpowder. This requires proof that the weapon or device is operable. Where the State presented no evidence the weapon was tested to determine if it is an operable firearm, did the State present sufficient evidence that an item described as a .22 caliber handgun was in fact a "firearm?" Assignments of Error No. 8 and 9.

8. A prosecutor commits misconduct when he appeals to the jurors' passion and prejudices. Where the prosecutor urged the jurors to place themselves in the place of the victims, did he commit misconduct requiring reversal? Assignment of Error No. 10.

9. Many crimes involve some degree of restraint. To prove a separate "restraint" crime such as unlawful imprisonment, the prosecution is required to show that the restraint supporting the separate crime was not merely incidental to another crime but instead had a separate, distinct purpose. Here, Azariah Ross or an accomplice was accused of restraining people within two households by threatening them with a gun and putting

physical restraints on one of them in order to commit burglary and robbery. He was convicted of two counts of first-degree burglary, five counts of first-degree robbery, and six separate counts of unlawful imprisonment for those very same acts. Should the charges of the unlawful imprisonment counts be reversed and dismissed where the restraint used was incidental to the burglary and robbery, was not for any independent purpose, and occurred at exactly the same time? Assignment of Error No. 11.

10. The appellant was convicted of robbery with a deadly weapon and unlawful imprisonment with a deadly weapon for each of six victims. With regard to each victim, the alleged robbery and unlawful imprisonment occurred simultaneously and involved the same criminal purpose. There was no evidence appellant restrained the victims in a place he or she could not be easily found or that any of the victims suffered injuries during the restraint. Where the restraint on each victims' movements was incidental to the robbery, was there insufficient evidence to support appellant's unlawful imprisonment convictions? Assignment of Error No. 11.

11. Current offenses amount to the "same criminal conduct," and shall be counted as only a single offense in the offender score, if they were committed at the same time and place, involved the same victim, and required the same objective criminal intent. Where a person commits a unlawful imprisonment to further a robbery, robbery is the objective intent

behind both crimes. Do Azariah Ross' convictions for unlawful imprisonment and robbery of the same four alleged victims in two separate alleged robberies constitute the "same criminal conduct," where they occurred at the same time and place and the purpose of each instance of unlawful imprisonment was to further the robberies. Assignment of Error No. 12.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural facts:**

A series of home invasion<sup>2</sup> robberies took place in Tacoma, Washington between January 25, 2012 and August 26, 2012. Clerks Papers (CP) 91-117, 224-250, 294-317, 925. The robberies took place in primarily Asian communities and were characterized by two men who entered a house with one or more weapons, either restraining the occupants or moving them to one location in the residence during the robbery, and ransacking the residence over a prolonged period. The men took primarily cash, jewelry, gold, electronic items, and firearms. In five of the seven incidents, the men were in communication with a person outside the house using radios.

Law enforcement officials investigating the string of burglaries obtained receipts indicating that Azariah Ross, Azias Ross, and Alicia Ngo

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<sup>2</sup>Defense counsel unsuccessfully moved to prohibit the use of the term "home invasion" at trial. RP at 343-49. The court denied the motion, noting that the "concept of a home invasion robbery has made its way into the common lexicon and has a certain connotation

had pawned jewelry and gold around the time of the incidents. Many of the items were among those stated by the burglary victims to have been taken from them during the robberies. In addition, several of the victims were able to identify Nolan Chouap from photomontages. The second man, however, remained unidentified.

While at the South Hill Mall in Puyallup, Washington on August 27, 2012, police arrested Azariah Ross,<sup>3</sup> his brother Azias Ross, Soy Oeung, Nolan Chouap, and Alicia Ngo. Report of Proceedings<sup>4</sup> (RP) 8/19/13, (CrR 3.5 Suppression hearing) at 5-7. During the arrest, police determined that Azariah Ross had \$5,600 in \$100 bills, jewelry, which was linked to a home invasion robbery that occurred on August 26, 2012. Police stated that at the time of the arrests on August 27, 2012, Alicia Ngo had 72 \$100 bills in her

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as a descriptor . . . [a]nd while it is understood that there may be some prejudice from the use of that word, I don't find undue prejudice in this case[.]" 3RP at 349.

<sup>3</sup>Azariah Ross and Azias Ross are referred to by their first names in this brief to assist in identification.

<sup>4</sup>The record of proceedings consists of the following hearings and trial dates: August 19, 2013 (CrR 3.5 hearing), September 19, 2013, December 18, 2014, February 6, 2015, January 10, 2014, May 8, 2014, August 31, 2015, September 1, 2015 (verdict); 1RP—July 9, 2015, jury trial; 2RP—July 13, 2015, jury trial (*voir dire*); 3RP—July 14, 2015, jury trial (*voir dire*); 4RP—July 15, 2015, jury trial (*voir dire*); 5RP—July 20, 2015, jury trial; 6RP—July 21, 2015, jury trial; 7RP—July 22, 2015, jury trial; 8RP—July 23, 2015, jury trial; 9RP—August 3, 2015, jury trial; 10RP—August 4, 2015, jury trial; 11RP—August 5, 2015, jury trial; 12RP—August 6, 2015, jury trial; 13RP—August 10, 2015, jury trial; 14RP—August 11, 2015, jury trial; 15RP—August 12, 2015, jury trial; 16RP—August 13, 2015, jury trial; 17RP—August 14, 2015, jury trial; 18RP—August 18, 2015, jury trial; 19RP—August 19, 2015, jury trial; 20RP—August 20, 2015, jury trial; 21RP—August 24, 2015, 22RP—August 25, 2015; 23RP—August 26, 2015, and October 12, 2015 (sentencing).

possession that was also linked to the August 26 robbery.

The State charged Azariah with a total of 52 charges stemming from seven home invasion robberies, including 14 counts of first degree robbery, seven counts of first degree burglary, one count of conspiracy to commit first degree robbery or first degree burglary, 18 counts of unlawful imprisonment, seven counts of first degree trafficking in stolen property allegedly taken during the robberies, two counts of theft of a firearm, and three counts of second degree assault.<sup>5</sup> CP 294-317.

The State also charged Azariah with multiple firearm enhancements. CP 294-317. Following trial the jury was unable to reach a verdict regarding all but two of the robberies.

The State charged Azariah with a home invasion robbery that took place on May 10, 2012, at the residence of Remegio and Norma Fernandez, in which he was alleged to have committed first degree burglary (count 12), two counts of first degree robbery (count 13 and count 14), two counts of unlawful imprisonment (count 15 and count 16), theft of a firearm (count 17), and trafficking in stolen property in the first degree (count 18). CP 294-317. Prior to the robbery a female who was subsequently identified as Soy Oeung, knocked on the Fernandez' front door about an hour before two men

forced their way into the house. 7RP) at 912-14.

Another home invasion robbery occurred June 29, 2012 at the residence of Hing Yu and Thein Moo, which was also occupied by Rany Eng and her eleven year old daughter A.E. 8RP at 1143-51, 9RP at 1154-1214. The State alleged that Azariah and Nolan Chouap committed the robbery and charged Azariah with first degree burglary (count 34), first degree robbery involving Rany Eng (count 35), first degree robbery against Hing Yu (count 36), first degree robbery against Moo Theim (count 37), and four counts of unlawful imprisonment (counts 38, 39, 40, 41). The State also alleged that he committed first degree trafficking in stolen property on August 26, 2012 (count 52) pertaining jewelry in Azariah's possession at the time of his arrest. CP 294.

The State also alleged a deadly weapon or firearm enhancement for each of the May 10, 2012 and June 29, 2012 charges, except count 17. CP 294-317.

To attempt to clarify the wide variety of counts, the convictions relevant to this brief are as follows:

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<sup>5</sup>The State alleged the robberies took place on January 25, 2012, April 27, 2013, May 10, 2012, June 9, 2012, June 17, 2012, June 29, 2012, and August 26, 2012.

Date of alleged offense	Residents involved	Charges resulting from the alleged offense
May 10, 2012	Norma and Remegio Fernandez	First degree burglary (Count 12), first degree robbery (Counts 13 and 14), unlawful imprisonment, (Counts 15 and 16), and theft of a firearm (Count 17)
June 29, 2012	Hing Yu, Theim Moo, Rany Eng, and A.E.	First degree burglary (Count 34), first degree robbery (Count 35), and unlawful imprisonment (Counts 38, 39, 40, 41).

CP 294-317.

Azariah Ross was originally charged with four co-defendants: his brother Azias, Soy Oeung, Alicia Ngo, and Nolan Chouap. Azariah's case, however, was severed from his co-defendants in January, 2013 due to unavailability of Azariah's trial counsel. RP (12/18/14) at 3. Of the five defendants initially joined for trial, only the charges against Azias and Soy Oeung proceeded to full trial in 2014.<sup>6</sup> Nolan Chouap, the second alleged principal in the robberies, pleaded guilty prior to the completion of the trial in February, 2014. All charges were dismissed against co-defendant Alicia Ngo.

**a. CrR 3.5 suppression hearing:**

On August 19, 2013, the court heard testimony pursuant to CrR 3.5

regarding Azariah's alleged statements to law enforcement on August 27, 2012. RP (8/19/13) at 3-129. Detective Tim Griffith of the Tacoma Police Department questioned Azariah in an interview room for approximately one to two hours, after having been placed in a holding cell for ten hours after Azariah, Azias, Nolan Chouap, Soy Ocung and Alicia Ngo were arrested earlier that day at approximately 1:00 p.m. RP (8/19/13) at 34-35, 40, 116. Azariah was taken from the holding cell at approximately 11:25 p.m. to the interview room, where he had been sleeping. RP (8/19/13) at 117. During the suppression hearing the officers denied that Azariah had Percocets in his possession in the interview room, despite that information contained in the notes of Officer Robert Baker. RP (8/19/13) at 117. Detective Griffith stated, when asked if there had been Percocets found in the interview room, "I believe there were some found in the room, but I don't recall the issue of him being high, [and] I did not notice any indications of him being high on drugs." RP (8/19/13) at 36-37. During interrogation, Azariah allegedly admitted to committing robbery on January 25, April 27, and August 26, 2012. Counsel argued that Azariah did not make a confession but was asked to affirm the statements made by his codefendants instead of being asked to make an individualized statement, that he was held without food or anything

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<sup>6</sup>State v. Ross, Court of Appeals No. 46425-0-II, *State v. Oeung*, COA No. 46425-0-II

to drink for ten hours, and that his alleged admission to being present during three of the robberies was therefore not knowingly, intelligently and voluntarily made. RP (8/19/13) at 120-21. The State argued that they were given food and the opportunity to go to the bathroom, contrary to defense counsel's argument. RP (8/19/13) at 123.

**b. Court's suppression ruling**

The court made its oral ruling regarding the suppression motion on October 24, 2015. CP 205-222 (Oral Ruling of the Court Regarding CrR 3.5, December 18, 2013). The court ruled that each of the defendants' statements were knowingly, voluntarily, and intelligently made and that the statements to law enforcement by each of the defendants were admissible. CP 205, Ruling Regarding CrR 3.5 at 16. In particular, the court found that although Azariah claimed his statements were not knowingly, intelligently or voluntarily made because he was under the influence of Percocet, there was no evidence to support that contention. CP 205-222. The court found that there was no evidence that he was under the influence at the time that he was interviewed. The court also found that he was able to understand his rights and in fact "refused to answer one question during the interview, but did not ask for an attorney at any time, nor did he ask for the questioning to stop." CP 205.

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(June 14, 2016).

At trial, Detective Baker testified regarding Azariah's alleged statements during the interview. 16RP at 2218-19. Specifically, Det. Baker stated that Azariah alleged said that he was present during the robberies on May 10, June 9, June 29, and August 26, 2012. To date, no CrR 3.5 findings or conclusions have been filed.

**c. Motion to dismiss counts due to insufficiency of Second Amended Information**

During trial, defense counsel moved to dismiss virtually all the charges on the grounds that the state failed to plead sufficiently identifying information in the charging documents. 18RP at 2421 90CP 402-436 (Motion to Dismiss All Counts, August 18, 2015). After hearing argument, the court denied the defense motion, including the counts for which he was eventually convicted. 18RP at 2480.

**d. Motion to exclude evidence of the newspaper article regarding police investigation of a series of home invasion robberies in Tacoma.**

Defense counsel moved for exclusion of evidence of an article dated July 4, 2012 from the Tacoma News Tribune about a police invitation of a series of home invasion robberies that Azias read after his arrest, that apparently lead to a series of telephone calls regarding the robberies. 13RP at 1662. Exhibit 117A. The article was given to Azias by another inmate in the

pierce county jail. 13RP at 1668. The telephone call was monitored, which lead to police investigation of Azias as a person of interest in the robberies. 13RP at 1665. The State argued that the article was relevant to show the effect it had on Azias, causing him to call his mother, Gum Lai Ross from the jail. 13RP at 1667. The State argued that the article established that he knew that the contents of the article were a report of crimes in which he was involved, causing him to make calls regarding the article. 13RP at 1667. The State proposed a limiting instruction that the contents of the article should not be considered for the truth of the criminal allegations against Azariah. 13RP at 1666.

The trial court found that the article was admissible and gave the proposed limiting instruction. 13RP at 1669. The court redacted a paragraph from the article that stated that the “robbery fits the profile of six others since December” and a sentence that indicates that the robberies “apparently targeted Asian families.” 13RP at 1669.

Over defense objection, the redacted newspaper article—titled “Police Seeking robbers who target Asian Families,” was admitted as Exhibit 117A and a limiting instruction was read to the jury. 13RP at 1694-95. The State also played several jail phone calls, including calls made on July 4 and July 5, 2012. 13RP at 1698. Exh. 141, 130, The male speaker was identified by

Detective Griffith as Azias and a female voice was identified as Soy Oeung. 13RP at 1699.

**2. Trial testimony:**

Jury trial in the matter took place from July 9 to September 1, 2015, the Honorable Elizabeth Martin presiding. The State introduced testimony from witnesses regarding seven home invasion robberies that occurred in Tacoma between January 25, 2012 and August 26, 2012.

The State alleged the same group of individuals committed each of the crimes, which primarily targeted residences occupied by persons of Asian descent.

**a. Soeung Lem residence, January 25, 2012**

Soung Lem, who is originally from Cambodia and testified through an interpreter, stated that on January 25, 2012, she lived in a house in the 9100 block of McKinley Avenue East, in Tacoma with her four adult children. 5RP at 716-718, 757. Around 5:00 p.m. she left the house to take out the garbage. 5RP at 719. Her children were at work and had not returned at that time. 5RP at 719. As she returned to the house, a man grabbed her arm and held a gun against her head and said in English, "Do you know what this is?" 5RP at 719-21. The man led her into the kitchen near the oven and had her get face down on the floor and asked again, this

time in Cambodian, "Do you know what this is?" 5RP at 721.

Ms. Lem testified the man wore a mask covering his face from the nose down. 5RP at 722. She testified that she saw his forehead and mustache and noticed he had facial acne. 5RP at 733. Ms. Lem stated that the man said in English, "I'm looking for gold." 5RP at 722. He grabbed her hand and pointed to a gold ring she was wearing and said "this is what I'm looking for here, gold. Where are they?" 5RP at 722. She stated that the man tied her hands behind her back with rope or wire, but did not take the gold ring. 5RP at 722. He then pulled her up and led her to a sofa, where she remained face up, and then covered her face with a jacket, but removed it about ten minutes later. 5RP at 723. She stated that while her face was covered a second man searched a cabinet and drawers in the house. 5RP at 723. The second man had been upstairs and came downstairs into the family room. 5RP at 726. After searching the house, both men left through the same sliding glass door they had used to enter the house. 5RP at 733.

One spoke Cambodian and Ms. Lem thought he was raised in the United States due to his accent. 5RP at 737. She described the man with the gun as being short and that she spoke Cambodian to her. 5RP at 735. The taller man spoke English, and the two men spoke to each other in English. 5RP at 739. The men remained in the home about 30 minutes. Before

leaving, they removed the jacket and told Ms. Lem to wait 15 minutes before getting up. 5RP at 748.

Ms. Lem eventually freed her hands and called family members, who called the police. 5RP at 748-49. Ms. Lem discovered the men had taken jewelry that belonged to her and to her daughter, her purse and also \$4,000.00 in cash belonging to Ms. Lem's daughter. 5RP at 749.

Ms. Lem picked Nolan Chouap out of photomontage as one of the men who participated in the robbery. 5RP at 751. Ms. Lem's daughter, Natalie Chan, stated that in addition to jewelry, the men took electronic devices, her passport, personal identification including driver's license, and \$4,000.00 in cash that belonged to Ms. Lem. 5RP at 765-68.

**b. Bora Kuch residence, April 27, 2012**

Ms. Kuch, who is originally from Cambodia, also required an interpreter at trial. 6RP 786. She lived in a house at the 8200 block of South "G" Street in Tacoma with her daughter, son-in-law, and two-year-old grandson. 6RP at 789. Ms. Kuch heard a noise at a window of her house the afternoon of April 27, 2012. 6RP at 793. She heard a second noise from the outside and opened the door and two men entered the house, pushed her to the floor and then restrained her by tying her hands behind her back. 6RP at 796-97. The men were in the house for close to two hours,

and searched the house and took jewelry including necklace and earrings, gold, three guns and cash. 6RP at 795, 798, 826, 839, 878. One of them said "do you want to die" and pointed a gun at her. 6RP at 798. They demanded money and she gave them \$500 she had earned harvesting bear grass that she kept under her mattress. 6RP at 800, 832. The men asked for a key to a safe that belonged to her son in law and threatened to take her two year old grandson, who was also in the house. 6RP at 800. Ms. Kuch did not have a key for the safe, and the man broke it open with hammer, pitchfork, and shovel. After breaking it open, one of them took a gun from the safe, showed it to her and said "Looks great, grandma." 6RP at 817. She stated the one was shorter and the other man was taller than she is, and that the shorter man spoke Cambodian. 6RP 802. She saw the first man's face before he covered it using one of Ms. Kuch's shirts. 6RP at 797.

She described the man as being over 20 years old, long hair, with mustache. She stated that the men's faces were covered, but she identified one of them as being Cambodian, but Ms. Kuch thought he was born in the United States due to his accent. 6RP at 802-04.

The taller man, whose lower face was covered with a handkerchief, spoke English on a phone to a woman outside the house during the robbery. 6RP at 805, 807. Ms. Kuch heard a female voice speaking English on the

cell phone used by the man. 6RP at 807-10.

Her two year old grandson watched television during the robbery and was unharmed. 6RP at 819.

The men searched that house and then then eventually left. 6RP at 818. After they left, Ms. Kuch called her daughter and told her what happened.. 6RP at 819. 660. She stated that the men took \$500.00 in cash and jewelry including rings, bracelets, earrings, a necklace and gold items. 6RP at 826, 836.

Ms. Kuch's son in-law, Fred Van Camp, learned of the incident later that evening and called the police. The house had been orderly when Van Camp left for work, but was in a state of disarray when he came back; his mother in law was distress, scared, and was shaking. 6RP at 871, 876.

Fred Van Camp's gun safe was crudely forced open. 6RP at 873, 875. He stated that there had been several guns in the safe, including some that belonged to Van Camp's friend, Sidoung Sok. 6RP at 873-74. Most were missing after the robbery, including a .357-caliber revolver that had been stored in the closet. 6RP at 869-72.

Van Camp also noticed jewelry and a "gold bar" were missing from the safe, which Van Camp had also been storing for his friend. 6RP at 889-

90. Several weeks after the incident, police showed Ms. Kuch a photomontage and she told the police that the first man looked similar to the photo of Nolan Chouap.

**c. Remegio and Norma Fernandez residence, May 10, 2012**

Remegio Fernandez emigrated from the Philippines to the United States in 1969 after living in Guam for several years. 7RP at 906. He and his wife Norma Fernandez lived on the 7000 block of South Ainsworth Avenue in Tacoma. 7RP at 907. At approximately 6:00 p.m. on May 10, 2012, a woman knocked on the front door of their house while Mr. and Mrs. Fernandez were watching television. 7RP at 908. Mr. Fernandez went to the front window and saw a woman at the front door. 7RP at 909. He asked her what she wanted and she asked for "John." 7RP at 909. He told her that no "John" lived there and the woman turned and went out the gate. 7RP at 912. He watched her get into a car that was parked in front of his house. 7RP at 913.

About an hour later, while they were playing cards and watching television, Mr. Fernandez heard a crash in his sliding patio door. 7RP at 914. He looked and saw two men standing in his patio door. One of the men was pointing a handgun with a laser sight at him. 7RP at 915. One

of the men said "we want your money," 7RP at 916. He told them that he did not have money in the house and one of them said that they wanted jewelry they were wearing. 7RP at 916. One of the men pulled off a gold necklace that Mrs. Fernandez was wearing. 7RP at 917. Mr. Fernandez was wearing a hip bag which he searched for money and one of the men stated that they would take them to an ATM to get money. 7RP at 917. The men took both of them upstairs and searched the master bedroom, including drawers and the closet. 7RP at 918. Mr. Fernandez stated that the men said that "We know you people don't keep your money in the bank. You keep it in your house . . . ." 7RP at 918.

The men initially had them sit in the master bedroom, but after approximately 45 minutes, Mr. Fernandez tried to run to get help, but was overtaken downstairs where he was caught outside the broken patio door and pulled back to the master bedroom bathroom, where he was forced to sit. 7RP at 919, 922. The man with the gun then tied phone charger cords around his hands and feet. 7RP at 919, 927. After he was caught, the man with the gun punched and kicked him on the ground, and said that "you made me mad" and started breaking glass picture frames in a cabinet in the living room and also put the barrel of the gun in Mr. Fernandez' mouth. 7RP at 923-26.

Mr. Fernandez said the shorter of the two had the gun was wearing pants and gloves and a ski cap and handkerchief over his face, leaving only his eyes uncovered. 7RP at 929. The taller of the two was also wearing a cap and had his face covered with a handkerchief. 7RP at 929. Mr. Fernandez was able to see the face of the man with the gun when his handkerchief fell down. 7RP at 931. He stated that the man repeatedly removed the magazine from the gun to show him that the gun was loaded and that he said "I could kill you with this." 7RP at 934, 935.

The taller of the two had a radio which he used to communicate with a female located outside the house. 7RP at 939-40. He stated that heard a woman's voice asking if they were done yet and the man answered "No, we are still searching." 7RP at 941.

Mr. Fernandez stated that both men spoke English to each other. 7RP at 939. After approximately three hours of searching the house, the men left, but not before telling them to make sure they did not move because they had friends by the nearby Jack in the Box restaurant and they would come back and beat them up if they did anything. 7RP at 944. After they left, Mr. Fernandez called 911. 7RP at 945. He stated the they took items including \$5,000.00 in cash, jewelry, a video game system, laptop, the necklace and a .22 caliber pistol. 7RP at 954. Among the property missing after the

incident was an item described as a pistol that had belonged to Mr. Fernandez's father, who had returned to Guam; Mr. Fernandez described it as a .22 caliber pistol. 7RP at 954.

Mr. Fernandez said that it was ten or fifteen years old and had never seen the device fired, and he had never fired it; but that the he was "pretty sure that it works." 7RP at 954.

Mr. Fernandez later identified Nolan Choeup as the man with the gun who committed the invasion. 7RP at 959.

**d. Douc Nguyen and Thanh Vu residence, June 9, 2012**

Douc Nguyen lives with his partner Thanh Vu in the 1800 block of South 90<sup>th</sup> Street in Tacoma. 7RP at 1011. Mr. Nguyen was watching soccer on television in his bedroom at 3:00 a.m. on June 9, 2012. 7RP at 1012. He stated that the door opened and that a man entered the room while holding a gun, he put it to his head and told him "this is a gun that can kill." 7RP at 1013. He noticed that the gun had a laser and he was able to see the light from the laser sight. 7RP at 1013. The man forced him to his wife's bedroom, where she saw a second man, who was holding Ms. Vu at gunpoint. 7RP at 1014. The men ordered them both to the bathroom, and they complied. 7RP at 1015. Mr. Nguyen testified that the men searched the

house for approximately two hours, and that they were in radio communication with a woman who was outside the house. 7RP at 1017, 1026. He said they spoke English but used slang terms with the person on the radio. 7RP at 1026. He stated that before they left the house, the men tied his hands in front of his body with tape, but that they did not bind Ms. Vu. 7RP at 1019. As they were leaving, the men told them "stay still because we are going to leave, and if you move, we are going to shoot you." 7RP at 1019. The witnesses stated that both men wore gloves and that their faces were covered except for their eyes. 7RP at 1020, 1039. He said that man who entered his bedroom pulled the magazine out of the gun and showed it to him and said "this is a real cartridge." 7RP at 1028.

Ms. Vu stated that at one point the shorter of the two men forced her to go with him to the garage to search her car. 7RP at 1045. Ms. Vu stated that jewelry, necklaces, earrings, rings and other items including gold and silver, electronics, cameras, a large cleaver knife, a bottle of Remy Martin Cognac, and a \$283 in cash were taken. 8RP at 1094, 9RP at 1105, 1113. The men were in the house approximately an hour, and left at about 4:00 a.m. 7RP at 1043.

**e. Thuy Ha residence, June 17, 2012**

Ms. Ha stated that she was at home early on the morning of June 17,

2012, when she heard noises outside her house, which she occupies with upstairs rooms with her children. 9RP at 1206. She heard the sound of people running up the stairs, opened the door, and saw two men holding guns with the faces covered. 9RP at 1207. They entered the room, told her not to move and then forced her and her children and parents into a bathroom. 9RP at 1208-09. One man watched them while the other man searched the house. 9RP at 1210. She stated that the men spoke English and one of the men used a radio to communicate. 9P at 1213.

**f. Hing Yu and Theim Moo residence, June 29, 2012**

Mr. Yu testified that he was robbed at his house on June 29, 2012, when two men came into his house, beat him up and hit him on the head. 8RP at 1129. He said that one of the men had a gun and the other went upstairs. 8RP at 1130. He said that man showed him the bullets in the gun and spoke to him in Cambodian. 8RP at 1131. He stated they were in communication with a woman outside the house. 8RP at 1131. He said that his wife Theim Moo was also home at the time. 8RP at 1129. He stated that the men had their faces covered and were wearing dark sunglasses. 8RP at 1130. Ms. Moo stated that at approximately 5:00 p.m. on June 29, 2012 two men came into the house. 8RP at 1144. She said that one of them took a

security camera and threw it at her, hitting her in the corner of her eye, causing her to bleed. 8RP at 1144. She said that a handgun that one of the men used had a red light. 8RP at 1145.

Rany Eng was also present in the house at the time of the robbery. Ms. Eng, who is a housemate of Mr. Yu and Ms. Moo, testified that she and her eleven year old daughter A.E. were home at the time and had gone outside to the back yard and at that time two people entered the house through the back door. 8RP at 1157. She said that men forced her to sit down and then one of the men went upstairs. 8RP at 1161. She stated that the house has an alarm system and Mr. Yu pushed the alarm several times, but did not receive a police response. 8RP at 1164. Ms. Eng stated that Mr. Yu, who is elderly, tried to walk out of the back door of the house, but one of the men followed him, hit him with a gun, and brought him back into the house. 8RP at 1163. She said that the men were wearing gloves, glasses, a hat, and also had something covering parts of his face. 8RP at 1168. She said the man spoke in English to a woman on the radio, but spoke the word "sit" to her in Cambodian to her. 8RP at 1169. Ms. Eng stated that she tried to get through the front door to call for help, but the man pointed a gun at her and said in English "do you want to die?" 8RP at 1182. She stated that they remained in the house for close to an hour. 8RP at 1188. She said that they

took items from Mr. Yu, Ms. Moo, and \$8,000.00 in cash that belonged to her husband. 8RP at 1192.

**g. Hoang and Sophea Danh residence, August 26, 2012**

Hoang Danh and his two sons returned to their home on the 600 block of East 51<sup>st</sup> Street in Tacoma. 10RP at 1315. As they entered the house, they were confronted by two men who were already in the home. 10RP at 1315. The men threatened Mr. Danh with a knife taken from Mr. Danh's kitchen. 10RP at 1323. Mr. Danh opened his safe as he was directed to do by the men. 10RP at 1340. Mr. Danh's wife, Sophea, arrived home an hour after Danh. 10RP at 1340. Sophea testified the two men took about twenty thousand dollars in \$100 bills from the family's safe, and jewelry and a camera from the home. 10RP at 1354.

Hoang and Sophea Danh selected Mr. Chouap from a photomontage, but neither was certain he was one of the robbers.

**h. Arrest of Azariah Ross in parking lot of the South Hill Mall**

On August 27, 2012 the day after the Danh robbery, police surveilled Chouap's apartment, and they followed him after Chouap got into a minivan that was driven to the South Hill Mall in Puyallup. The van pulled in near a Dodge Stratus in one of the mall parking lots, and police

arrested Nolan Chouap, Azariah and his brother Azias, Alicia Ngo, and Soy Oeung, all of whom were in the Stratus were also arrested.

As part of the investigation, Tacoma police executed a search warrant of an apartment located at 915 75th street E in Tacoma on August 27th, 2012.

13RP at 1705. Police found a number of credit cards, rewards cards in the name of Hoang Danh, Sophea Kuoch in the apartment. 13RP at 1705-09. Police also searched a house located at 8632 South Asotin in Tacoma on August 27, 2012. 13RP at 1713. Police recovered from the lower level of the house the following: .38, .45, .40, .380 and .357 caliber rounds, two bandanas, a pair of black gloves, a black balaclava-type head scarf. 13RP at 1722-24, 1728.

**i. Azariah's Percocet addiction and its role in his arrest and custodial interrogation**

After his arrest, Azariah was handcuffed and transported to a jail where he was placed in a holding cell. 19RP at 2738. After 11 p.m. he was taken from the holding cell and taken to another area of the jail and integrated for approximately two hours. Detective Timothy Griffith stated that he provided details of some of the incidents to "jog his memory so that he knew which incident we were talking about." RP at 1683. The detective was unable to state which specific details were provided to Aziah during the

questioning. RP at 1684. He testified that he took notes, but that no taped recording was made of the questioning. RP at 1680.

Azariah testified that he was in Spokane for a graduation ceremony from May 9 to May 17, 2012. RP at 2719. He stated that he went there with his mother, father, grandmother and his niece and stayed at his sister's house in Post Falls, Idaho. RP at 2720.

Azariah, who was 19 at the time of the alleged offenses, acknowledged that he had a long term used of Percocet. 19RP at 2691-2704. He first started using the drug at age 16, when he stole Percocet pills from his father. 19RP at 2696-99. He would use as many as eight to ten 30 milligram Percocets a day, which caused him to be high for most of each day. 19RP at 2693. He obtained the Percocets, which cost approximately a dollar milligram, by a variety of means, including selling gold also and making "drops," which consisted of dropping off drugs during drug deals. 19RP at 2700. When selling drugs, people would pay him with jewelry, shoes, clothing, cell phones, and electronics. 19RP at 2701. He testified that he was selling gold and jewelry for people including Nolan Chouap, and that they send him to a jewelry store to sell items because he had identification. 19RP at 2707. In return, he would receive money or Percocets. 19RP at 2708. He stated that on August 27, 2012, the day of his arrest at South Hill Mall, the

people who were arrested had money from the sale of two cars advertised on Craigslist. 19RP at 2725. After selling both cars, Azariah was given cash in \$100.00 bills and Percocets. 19RP at 2728. Azias and Azariah then drove to the South Hill Mall, along with Soy Oeung. He stated that he had jewelry with him that he obtained from another person, who wanted him to sell it at the mall. 19RP at 2736.

Azariah stated that while in the holding cell, he had access to his property, and using his leg to pull it toward him, was able to take three Percocet pills from a container in his property. 19RP at 2741. He stated that he took one of the pills and put the other two in his pocket. 19RP at 2741. He stated that he was under the influence of the 30 milligram Percocet pill when he was removed to an interview room for questioning. 19RP at 2743. He stated the during the interview, both remaining Percocets fell out his pocket, and when he asked the police if he could have them, Detective Baker stated, "You trying to get me fired?" 19RP at 2750. He stated that Detective Griffith came into the room and told him about the Percocets on the floor, and then told Azariah, "we will take about that later." 19RP at 2751. Azariah denied that he told the police that he was involved in "two or three" robberies. 19RP at 2752.

**j. Jury verdicts:**

The jury ultimately convicted Azariah of a total of 16 counts, primarily involving the May 10, 2012 and the June 29, 2012 robbery. CP 925-26. The convictions consist of the following: trafficking in stolen property as charged in Counts 11, 18, 33, and 52; first degree burglary as charged in Count 12 and 34, first degree robbery as charged in Counts 13, 14, and 35; theft of a firearm as charged in Count 17; and unlawful imprisonment as charged in Counts 15, 16, 38, 39, 40, and 41. CP 944-46.

The jury acquitted him of first degree burglary as charged in count 2, first degree robbery as charged in count 3, unlawful imprisonment as charged in count 4, trafficking in stolen property as charged in count 5. RP (9/1/15) at 35.

The court declared a mistrial as to counts 1,4, 6-10, 19-23, 25-32, 36, 37, and 42-51, in which the verdict form was left blank.<sup>7</sup> RP (9/1/15) at 35.

At sentencing, defense counsel moved for new trial pursuant to CrR 7.5 or alternatively, arrest of judgment pursuant to CrR 7.4(1) based on prosecutorial misconduct objected to during closing argument and expression of opinion of guilt by a State's witness. CP 901-18 (Motion for New Trial,

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<sup>7</sup>The verdict form in Counts 25 and 42 were left blank, but the Special Verdict Form in each count was marked "yes." RP (9/1/15) at 21. Over defense objection, the jury was brought back in and the presiding juror was asked if a verdict was reached Count 25 and 42. RP (9/1/15) at 27. The presiding judge responded that a verdict was not reached in either count. RP at (9/1/15) at 27. The court declared a mistrial as to the counts. RP at

filed September 14, 2015). After hearing argument by counsel, the motion was denied. RP (10/12/15) at 3-20.

Azariah's counsel argued that the charges for unlawful imprisonment should merge with the burglary and robbery convictions, and theft of a firearm should also merge with burglary. RP (10/12/15) at 21-33. The court denied the motion regarding unlawful imprisonment and robbery and burglary, but did merge the theft of a firearm with burglary and robbery. RP (10/12/15) at 33.

The court sentenced Azariah to concurrent standard ranges on each charge, the longest of which was 156 months for each first degree robbery conviction (counts 13, 14, and 35). CP 951-52. The court also sentenced Azariah to 408 months of "hard time" for each firearm enhancements (counts 12, 13, 14, 15, 16, 34, 35, 38, 39, 40 and 41), for a total sentence of 564 months. CP 952. The court found that only the May 20, 2012 theft of a firearm and first degree burglary convictions merged for sentencing purposes. RP (10/12/15) at 21; CP 947.

Timely notice of appeal was filed October 22, 2015. CP 1015-33. This appeal follows.

#### **D. ARGUMENT**

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(9/1/15) at 28.

1. THE TRIAL COURT COMMITTED REVERSIBLE  
ERROR WHEN IT DECLINED TO SUPPRESS  
AZARIAH ROSS' STATEMENTS TO LAW  
ENFORCEMENT

- a. The totality of circumstances surrounding Azariah Ross' arrest indicate that he could not have knowingly, voluntarily, or intelligently waived his constitutional rights

Azariah Ross contends that the court erred by concluding that his statements to Detective Baker were made freely and voluntarily. He argues that the record shows that he was using Percocets and was addicted to the prescription drug and therefore incapable of understanding what was going on and not capable of intelligently consenting to talk to police.

The test of voluntariness places upon the prosecution the heavy burden of establishing that the appellant was fully advised of his rights, understood them, and knowingly and intelligently waived them. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966); *State v. Davis*, 73 Wn.2d 271, 281-88, 438 P.2d 185 (1968).

After advising an arrestee of his or her rights under *Miranda*, "a confession is voluntary, and therefore admissible, if . . . the defendant . . . knowingly, voluntarily[,] and intelligently waives those rights. To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made."

*State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). It is the "heavy burden" of the State "to demonstrate that the defendant knowingly and intelligently waived his [or her] privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 475; see also *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991).

When a trial court determines that a confession is voluntary, this Court may uphold that determination only "if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence." *Aten*, 130 Wn.2d at 664. "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

In this case, Azariah submits that the State failed to meet its burden of proof, and that his intoxication due to his Percocet addiction rendered him incapable of understanding what was going on and that his intoxication does not support the court's finding of voluntary waiver. The appellant argues that the officers who questioned him on August 27, 2012 were aware of the possibility that he was under the influence of drugs or going through withdrawals from drugs after being in custody for ten hours. First, Detective Griffith testified that Azariah was contained in a holding cell for

approximately ten hours until being taken to an “interview room” and questioned for several hours. Defense counsel asked each officer regarding signs of intoxication or if he had Percocet pills on his person. The officers consistently denied any knowledge of Percocet pills, except Detective Griffith, stated that he “believed” that some pills had been found in the interview room. RP (8/19/13) at 36. Azariah did not testify at the suppression hearing, however, during trial his testimony confirmed what defense counsel had been unable to elicit from the officers; that Azariah had a long term addiction to Percocet and that he had Percocet on his person while he was questioned, had taken one of the pills and had lost the others in the interview room.

The evidence supports his contention that police were aware that Azariah was using Percocet due to the recorded jail calls from Arias. in the calls, Azariah referred to pills. During the suppression hearing, defense counsel asked about the term and the officer stated that he took efforts to determine what drugs were referenced by the term. This information, counsel helped with the fact that police were also aware—or “had heard” about it, as Detective Griffith acknowledged, that Percocet were found in the interview room, supports the argument that he was under the influence of Percocets at the time of the interrogation. Accordingly, the appellant submits that his statements were drug induced and not a product of free intellect.

Intoxication alone does not render a statement involuntary, however, it is a factor in deciding whether a defendant understood his or her rights and made a conscious and rational decision to waive them. *Aten*, 130 Wn.2d at 664; *Reuben*, 62 Wn. App. at 625; *State v. Cuzzetto*, 76 Wash.2d 378, 457 P.2d 204 (1969); *State v. Gardner*, 28 Wn.App. 721, 723, 626 P.2d 56, review denied, 95 Wn.2d 1027 (1981). Whether a defendant's statements made in a state of intoxication are admissible "necessarily depend[s] upon the unique facts of the case." *State v. Gregory*, 79 Wn.2d 637, 642, 488 P.2d 757 (1971), overruled in part on other grounds by *State v. Rogers*, 83 Wn.2d 553, 556, 520 P.2d 159 (1974). The trial court's conclusion as to the admissibility of the accused's statements will not be set aside on appeal if there is substantial evidence supporting the voluntariness of the defendant's statement. *State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977).

Here, substantial evidence does not support the trial court's ruling and in fact points in the opposite direction. Any questioning that produces a confession that is not the product of rational intellect and free will renders the confession inadmissible under the Fifth Amendment. Here, the indications that were known to police that Azariah was under the influence of Percocet, due in part to the recorded calls referencing drugs, casts doubt on the State's position that he had the requisite faculties to waive his *Miranda* rights. The totality of circumstances shows that Azariah was incapable of making a

knowing, voluntary, and intelligent waiver. The trial court should have suppressed his incriminating statements. Accordingly, this Court must find the trial court erred in admitting Azariah's statements and reverse his convictions in Counts 11-18, 33-35, and 38-41.

**b. The erroneous admission of Azariah's statements was not harmless error and requires reversal of the convictions**

The trial court's error in admitting the statements requires reversal unless it was harmless beyond a reasonable doubt. *Reuben*, 62 Wn. App. at 626-27. A constitutional error is harmless under the "overwhelming untainted evidence" test "if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The error here was not harmless under this standard. The State must show that the admission of the confession did not contribute to the conviction. *Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). In this case, the State cannot meet this burden. The evidence of the identity of the second perpetrator was weak, and there is no question that Azariah's alleged statements resulted in the conviction for the May 10 and June 29 robberies. Although Mr. Chouap was identified as a suspect, Azariah was not identified in the photographic montages the police officers presented to the numerous victims.

The case does not involve DNA or fingerprint evidence. Presumably

because of the dearth of physical and eyewitness evidence, the prosecution relied heavily on Azariah's alleged confession. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 296 (internal quotation omitted). Azariah's statements that he had participated in the May 10, June 9, June 29 and August 26 robberies, were almost certainly the single most important factor contributing to his conviction, given that the jury was deadlocked on the issue of his involvement in the other robberies.

The State cannot show that this "probative and damaging" evidence did not contribute to the convictions. Because the State cannot show that the improper admission of Azariah's statements was harmless beyond a reasonable doubt, the convictions should be reversed and the case remanded for a new trial. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

2. **THE COURT ERRED BY FAILING TO ENTER  
WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW PER CrR 3.5**

The trial court held a CrR 3.5 hearing to determine whether Azariah's statements were the product of police coercion. However, the court failed to enter written findings of fact or conclusions of law as required by

CrR 3.5(c). Even if this court concludes that the custodial statements were admissible, this court must nonetheless remand this matter for the entry of written findings of fact and conclusions of law, as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Azariah and his former co-defendant's statements to the detectives was admissible, but no written findings or conclusions were ever entered. The trial court's failure to enter written findings and conclusions violated the clear requirements of CrR 3.5(c).

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Moreover, an oral ruling "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Id.* at 567 (emphasis added).

"When a case comes before this court without the required findings,

there will be a strong presumption that dismissal is the appropriate remedy." *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court "provide[] the for . . . needed consistency" and a "uniform approach." *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). Indeed, "[a]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Id.* at 624. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the appropriate remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

In this case, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

3. THE TRIAL COURT ERRED IN DENYING  
AZARIAH ROSS' MOTION TO DISMISS FOR  
INSUFFICIENT INFORMATION BECAUSE  
THE SECOND AMENDED INFORMATION  
OMITTED SUFFICIENT IDENTIFYING  
INFORMATION OF THE OFFENSES

**a. The challenged information must be strictly construed  
by the reviewing Court.**

Azariah argues that the second amended information did not contain the necessary elements of the crimes of first degree burglary, first degree robbery, and unlawful imprisonment petitioning to the May 10 and the June 29, 2012 robberies.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a charging document must include all essential elements of a crime to inform a defendant of the charges against him and to allow preparation for the defense. U.S. Const. amend. VI (providing "[i]n all criminal prosecutions, the accused shall...be informed Of the nature and cause of the accusation"); Wash. Const. art. 1 § 22 (amend. 10) (providing "[i]n criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him"); *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

CrR 2.1(b) also provides in part that "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. CrR 2.1 (b).

All essential elements of an alleged crime, both statutory and non-statutory, must be included in the charging document. *State v. Goodman*, 150 Wash.2d 774, 784, 83 P.3d 410 (2004); *Kjorsvik*, 117 Wash.2d at 101-02. In

addition, to adequately identifying the crime charged,<sup>1</sup> the charging document must also allege facts supporting every element of the offense. *Goodman*, 150 Wash.2d at 784, 786, 83 P.3d 410; *Kjorsvik*, 117 Wash.2d at 98, 101, 812 P.2d 86; *State v. Clowes*, 104 Wash.App. 935, 940–41, 18 P.3d 596 (2001). Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied. *Kjorsvik*, 117 Wash.2d at 109. The right to a constitutionally sufficient information is one that must be "zealously guarded." *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838(1965).

In *Kjorsvik*, the Supreme Court observed that "[t]he primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." 117 Wash.2d at 101, 812 P.2d 86. The court stated that "defendants are entitled to be fully informed of the nature of the accusations against them so that they can prepare an adequate defense." *Kjorsvik*, 117 Wash.2d at 101.

A charging document is constitutionally sufficient if the information states each statutory element of the crime, even if it is vague as to some other matter significant to the defense. *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). To determine the essential elements of the charged crime, the reviewing court looks first to the statutory language. *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). In so doing, the Court reads all the

words of the statute together, and construes the statute to avoid an absurd result. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *Young v. Estate of Snell*, 134 Wn.2d 267, 282, 948 P.2d 1291 (1997); *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981); *State v. Chester*, 82 Wn.App. 422, 427, 918 P.2d 514 (1996).

“The standard of review for evaluating the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made.” *Taylor*, 140 Wash.2d at 237, 996 P.2d 571. When a charging document is challenged for the first time after the verdict, it is to be “liberally construed in favor of validity.” *State v. Kjorsvik*, *supra*. In contrast, however, when an information is challenged before the verdict, as it was in the instant case, “the charging language must be strictly construed.” *Taylor*, 140 Wash.2d at 237, 996 P.2d 571. If, as here, a defendant challenges the sufficiency of the information “at or before trial,” the information is strictly construed. *State v. Vangerpen*, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995); *State v. Johnson*, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992); *Ralph*, 85 Wn.App. at 85. In this case, defense counsel made a motion to dismiss all but one charge based on an insufficient charging document on August 18, 2015, at the time the state rested. 18RP at 2421-2429. CP 402-436. Accordingly, *Vangerpen* is controlling in this case and the information should be strictly construed. Thus, if the information does not state the elements of

first degree burglary, first degree robbery, and unlawful imprisonment with at least a minimum level of specificity, it is constitutionally insufficient.

**b. Azariah was constitutionally entitled to notice that was both factually sufficient, as well as legally sufficient.**

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts. The rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wn. 2d 679, 689, 782 P.2d 552 (1989). This is not the same as a requirement to "state every statutory element of the crime charged. *Id* at 689. Following *Leach*, the Supreme Court elaborated further:

There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted that crime...[T]he "core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime."

*Auburn v. Brook*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992) (footnotes omitted, emphasis in original); *Kjorsvik*, 117 Wn.2d at 101-02 (holding that the correct rule is that all essential elements of an alleged crime must be included in the charging document in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared).

**4. THE INFORMATION WAS DEFICIENT BECAUSE IT  
FAILED TO INCLUDE SPECIFIC FACTS WHICH SPECIFIC  
RESIDENCE WAS INVOLVED IN THE CHARGES  
INVOLVING BURGLARY, ROBBERY AND FAILED TO  
DESCRIBE WHICH INDIVIDUALS WERE THE ALLEGED  
VICTIMS IN THE CHARGES INVOLVING UNLAWFUL  
IMPRISONMENT.**

Azariah Ross contends that the information was defective regarding the relevant counts because it failed to include specific facts supporting the allegation the he entered or remained unlawfully in a building with intent to commit a crime therein. Conviction of burglary requires proof that the accused person unlawfully entered or remained in a building with the intent to commit a crime against persons or property therein. RCW 9A.52.030. In this case, the Information outlined these legal elements; however, it did not allege any specific facts other than the date of each offense. CP .The second amended information charging Count 12 states as follows:

That AZARIAH CHENAS ROSS, in the State of Washington, on or about the 10<sup>th</sup> day of May, 2012, did unlawfully and feloniously, with intent to commit a crime against a person or property there, enter or remain unlawfully in a building, and in entering or while in such building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a deadly weapon and/or the defendant or another participate in the crime did intentionally assault a person therein, contrary to RCW 9A.52.020(1)(a)b), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and

against the peace and dignity of State of Washington.

CP 297, 306.

Count 34, also alleging first degree burglary, contains the same paucity of details with the exception of alleged that the offense took place on June 29, 2012. CP 306.

The Information alleged that Azariah entered or remained in a building and was either armed with a deadly weapon or assaulted a person in the building, but did not provide any facts outlying the underlying conduct that formed the basis for the allegation, in particular, the location of the residences where the offense was allegedly committed on May 10 and June 29, 2012. CP 297, 306.

With the exception of the date, the Information included nothing more than the bare, abstract language of the statute. It did not inform Azariah of the specific conduct he was charged with having committed. Accordingly, it lacked the minimal factual specificity required by *Leach*, and was factually deficient. *Leach, supra*; see also *Brooke*, at 629-630.

Similarly, the charges for first degree robbery suffer from the same defect; other than listing the alleged victim's last name and first initial, the date of the alleged offense, the information included nothing more than the bare recitation of the statute. CP 298, 307. Again it did not inform Azariah of the specific conduct he was charged with having committed.

The same deficiency exists in Counts 15, 16, 38, 39, 40, and 41, which allege six counts of unlawful imprisonment occurring on May 10, 2012, (Counts 15 and 16) and June 29, 2012 (Counts 38, 39, 40, 41). The second amended information states as follows:

That AZARIAH CHIENEZ ROSS, in the State of Washington, on or about the [10<sup>th</sup> day of May or 29<sup>th</sup> day of June] 2012, did unlawfully, feloniously, and knowingly restrain another person, contrary to RCW 9A.40.040, and in the commission thereof the defendant, or an accomplice, was armed with a firearm, that being a firearm as defined in RC 9.41.010, and in invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of Washington.

CP 301, 310-11.

Again, Azariah's specific alleged conduct or alleged victims were not included in the Information in Counts 12, 34, 38, 39, 40, 41. In the absence of any details outlining the alleged conduct, the charging document was both legally and factually deficient because it failed to provide "a description of the specific conduct of the defendant which allegedly constituted that crime. *Brook*, 119 Wn.2d at 629-30 (emphasis omitted). Nor can the underlying facts be inferred from the language used in the Information. The absence of specific information is especially prejudicial in this case involving multiple counts and multiple victims. Accordingly, under the strict construction standard, the information is constitutionally defective and the Court must

dismiss the case "without prejudice to the State's ability to refile the charges."

*State v. Ralph*, 85 Wn.App. at 86.

5. **PROSECUTORIAL MISCONDUCT IN  
CLOSING ARGUMENT DENIED  
AZARRIAH A FAIR TRIAL.**

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasman*, 175 Wn.2d at 703-04; U.S. Const. Amend VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasman*, 175 Wn.2d at 704.

a. **Prosecutors have special duties which limit their advocacy.**

The prosecutor, as a quasi-judicial officer, must seek a verdict free of prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096(1969). The court in *Huson* stated:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. . . . We do not condemn vigor, only its misuse. . . . No prejudicial

instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence.

*Huson*, 73 Wn.2d at 663 (citation omitted); see also, *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (citation omitted) (prosecutor has a special responsibility "to act impartially in the interest only of justice").

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury. *Reed*, 102 Wn.2d at 145. The burden is on the defendant to show that prosecutorial comments rose to the level of misconduct, requiring a new trial. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

**b. The prosecutor committed misconduct by appeal to the "passion and prejudice" of the jury during closing**

The State has a duty to ensure a verdict is free from prejudice and based on reason, not passion. *Huson*, 73 Wn.2d at 663. Comments meant to appeal to the jury's prejudice and encourage it to render a verdict on facts not in evidence are improper. *State v. Smith*, 67 Wn.App. 838, 844, 841 P.2d 76 (1992) (citing *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990)); see also *State v. Claflin*, 38 Wn.App. 847, 849-51, 690 P.2d 1186 (1984), rev. denied, 103 Wn.2d 1014 (1985) (reading of inflammatory poem in closing argument so prejudicial as to warrant reversal); see also, *Reed*, 102 Wn.2d at

145-47 (by characterizing defense counsel and defense experts as outsiders and "big city lawyers," opining that the death penalty should be reinstated for this case, and offering personal opinion on the defendant's credibility, prosecutor committed misconduct requiring reversal); *Belgarde*, 110 Wn.2d at 507 (where defendant was allegedly involved with the American Indian Movement, prosecutor's characterization of that group as "butchers" and "madmen" and references to Wounded Knee required reversal even though defense counsel had failed to object to the misconduct); *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (in child molestation trial, prosecutor improperly appealed to jurors' emotions by asking them to show the victim and other children "that you're ready to believe them and enforce the law on their behalf"); *State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P. 838 (2006) (in a trial for the manslaughter of an elderly woman caught in crossfire between rival gangs, prosecutor's inflammatory remarks, including an exhortation to the jury to "send a message" was misconduct "irreparably damag[ing] the fairness of the trial.")

Here, at the beginning of closing argument, the prosecutor exhorted the jury to imagine how the victims felt during the robberies and to compare the emotional fallout with the concept that "everyone" should feel safe in the sanctuary of their homes. During closing, the following exchange took place:

MR. WILLIAMS: These victims---and these are just some of them--these victims all believed, as everyone does, that their home is a place of sanctuary, a place of safety, a place of joy, a place where you raise your families. Everyone understands that if you go out into the community, you might, if you are in the wrong place at the wrong time, succumb to violation. No one should believe, as these victims now do---

MS. COREY: Your Honor, I am going to object to their type of argument on the lines of *Claffin* and in the recent Division II cases as an improper basis for urging a conviction.

THE COURT: I will sustain as to what the victims felt.

MS. COREY: And move to strike.

THE COURT: Stricken.

MR. WILLIAMS: No one should believe that they are not safe. No one should believe that might be the wrong place---

MS. COREY: I am going to object to this basically as an attempt to get that in that testimony or that argument is improper.

THE COURT: Overruled.

MR. WILLIAMS: For these victims, they suffered horrendous crimes. The idea that you could be at home watching TV or having dinner or asleep in your bed and men like the defendant and Nolan Chouap wearing masks and guns would come barreling into your homes? It's unimaginable that these victims would be threatened with their lives, threatened with their safety. It's horrible.

MS. COREY: Your Honor, I am going to object to this under the *Claffin* line of cases. I think the State's burden is to prove is beyond a reasonable doubt and not to emote.

THE COURT: Overruled.

MR. WILLIAMS: That these victims, imagine these victims were told, "If you don't give us what we want, we will kidnap your grandkids. If you don't stop fighting with us, we will kill your son." It's horrible. And it is for these actions, not once or twice or three times or four times or five times or six times, seven different times, these actions, families went through this and for this, justice demands accountability, and the accountability will come through your verdict forms.

MS. COREY: Your Honor, I object to this argument as urging a conviction on improper ground.

THE COURT: Sustained---

MS. COREY: Thank you.

THE COURT: --as to form.

RP at 2825-27

The prosecutor's repeated remarks were an appeal to jurors' passions and prejudices. Rather than encouraging the jury to render a verdict based solely on the evidence presented, he invited them to convict Azariah based on a sense of social "accountability" and appeal to a sense of fear that the victims experienced.

This Court should not condone such a comment by the prosecutor who has a "duty" to seek a verdict based on the evidence and not on passion or prejudice. *Huson*, 73 Wn.2d at 663; *Perez-Mejia*, Wn. App. at 907.

**c. Prosecutorial misconduct in this case require reversal**

Prosecutorial remarks are prejudicial where there is a substantial

likelihood they affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The prosecutor's improper comments were not ideas which could have been reversed by a curative instruction. A "bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976), rev. denied, 88 Wn.2d 1004 (1977). Because the flagrant instance of misconduct denied Azariah a fair trial, reversal of his tainted conviction and remand for retrial is necessary. *Belgarde*, 110 Wn.2d at 508.

6. **THE CONVICTIONS FOR UNLAWFUL  
IMPRISONMENT STEMMING FROM TWO  
SEPARATE INCIDENTS MUST BE REVERSED  
BECAUSE THE RESTRAINT IN EACH WAS  
INCIDENTAL TO THE OFFENSES OF BURGLARY  
AND ROBBERY AND THUS DID NOT SUPPORT  
SEPARATE CONVICTIONS UNDER DUE PROCESS  
AND DOUBLE JEOPARDY PRINCIPLES**

Under the state and federal constitutions, the government is prohibited from subjecting a citizen to "double jeopardy." Fifth Amend.3; Art. I, § 94; see *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), overruled in part and on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Both the state and federal double jeopardy clauses are given the same interpretation, and both protect against, inter alia, multiple punishments and multiple convictions for the

same offense. See *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000); *Pearce*, 395 U.S. at 717. Where a conviction violates double jeopardy, it must be vacated. See *State v. Womac*, 160 Wn.2d 643, 658-60, 160 P.2d 40 (2007); *Benton v. Maryland*, 395 U.S. 784, 796, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In addition, both the state and federal due process clauses require the prosecution to prove every element of a charged crime, beyond a reasonable doubt. U.S. Const. amend. 14; Wa. Const. Art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Evidence is sufficient to support a criminal conviction only where, taken in the light most favorable to the prosecution, a rational trier of fact could have found all of the elements charged beyond a reasonable doubt. *Green*, 94 Wash.2d at 221; see, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Where there is not such evidence, reversal and dismissal is required. *Green*, 94 Wn.2d at 221.

Reversal and dismissal is required for the convictions for the unlawful imprisonment of Remegio Fernandez, Norma Fernandez, Hing Yu, Theirm Moo, Rany Eng, and her daughter A.E., because there was insufficient evidence to support those convictions as a matter of law.

Many crimes involve some degree of "restraint." See, *State v. Johnson*,

92 Wn.2d 671, 676, 600 P.2d 1249 (1979), cert. denied, 446 U.S. 948 (1980); *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), affirmed in part and reversed in part, 157 Wn.2d 614, 141 P.3d 13 (2007). As a result, because the statutes defining "restraint" crimes such as kidnaping or unlawful imprisonment are generally "broadly worded," in this state a separate conviction for a "restraint" crime cannot be upheld on appeal if the restraint used was merely "incidental" to the commission of another charged crime. See *Green*, 94 Wn.2d at 226-27; *Johnson*, 92 Wn.2d at 676. This is because the "mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish" a separate crime. See *In re Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

If the restraint and movement of a victim are "merely incidental and integral to commission of another crime," the restraint and movement "do not constitute" an "independent, separate crime" of restraint and the conviction for the restraint crime must be dismissed. *Korum*, 120 Wn. App. at 703-704.

Constitutional ramifications pertain to the "incidental restraint" doctrine. Both the constitutional prohibition against double jeopardy and the constitutional due process right to be free from conviction upon less than sufficient evidence are implicated when a court examines whether a separate conviction for a "restraint" charge should stand. See *Brett*, 126 Wn.2d at 174

(noting it as an issue of "whether the kidnaping will merge into a separate crime to avoid double jeopardy"); *Green*, 94 Wn.2d at 226-27 (addressing it as an issue of the right to have the state prove all the essential elements of the crime beyond a reasonable doubt); see Fifth Amend.; Fourteenth Amend.; Art. I, §§ 3, 9.

"Merger" is a "doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *State v. Vladovic*, 99 Wash.2d 413, 419 n. 2, 662 P.2d 853 (1983). The judiciary has developed the merger doctrine over time as an extension of double jeopardy principles. U.S. Const. amend. V.

In this case, all six of the convictions for unlawful imprisonment - and their corresponding firearm enhancements - must be reversed and dismissed, because the restraint of Mr. and Mrs. Fernandez, Hing Yu, Theim Moo, Rany Eng and her daughter was incidental to the separate convictions for first-degree robbery and first-degree burglary.

The question of whether restraint is "incidental" to another crime depends upon the facts of each case, but includes evaluation of 1) the relationship between the restraint and the other crime, 2) the distance the victim was moved while restrained, and 3) the time which passes between the act of restraint and the other crime. *State v. Saunders*, 120 Wn. App. 800, 86

P.3d 232(2004). Thus, where the defendant grabbed the victim, picked her up, carried her 50 or 60 feet, placed her behind a building and then killed her, the restraint of grabbing and moving and secreting her did not support a separate kidnaping conviction because the "restraint" was incidental to the homicide. *Green*, 94 Wn.2d at 226-27. Similarly, in a case where two girls voluntarily went to the defendant's home, the restraint was incidental to rapes where the defendant took the girls into separate rooms, bound them, raped them, left to buy cigarettes, returned, and then took one of the girls to a wooded area where he raped her again. *Johnson*, 92 Wn.2d at 672-73. The restraint was "incidental" because not only did the crimes occur at almost the same time and place but the sole purpose of the restraint was to facilitate the rapes. 92 Wn.2d at 673.

In *State v. Berg*, 181 Wn.2d 857, 337 P.3d 310, 314 (2014), our Supreme Court summarized the merger doctrine in the following terms;

Essentially, the merger doctrine states that where crime A and crime B are charged separately and completion of crime A is also an element of crime B, crime A will definitely merge into crime B if crime A was incidental to the commission of crime B. If crime A was not incidental but rather had an independent purpose ... courts may impose separate punishment. Thus, the incidental nature of the crime is relevant to the application of an exception to the general merger doctrine.

The *Berg* Court stated, "[t]he law is now settled that just as kidnapping can never merge into robbery, neither can robbery merge into

kidnapping.” *Berg*, 337 P.3d 310, 314 (citing *State v. Louis*, 155 Wn.2d 563, 571 120 P.3d 936 (2005)). Counsel submits that *Berg* should not be the death knell for the issue of merger in this case. *Berg*, which addressed a kidnapping in the context of merger with robbery. Unlike the “pure kidnapping” in *Berg*, the instances of unlawful imprisonment in this case are incidental to the robbers’ clearly-stated goal, which was not to restraint people or move them around in the various residences while the robberies took place, but purely to obtain gold, jewelry, weapons, electronics, and other tangible items. Their use of restraint appeared to be haphazard by the perpetrators, who sometimes restrained their victims (as was the case with Mr. Fernandez), but usually did not.

In this case, the restraint used for the alleged unlawful imprisonments of the six persons on May 10 and June 29, 2012 were completely incidental to the burglary and robbery of the homes. Evaluating the relationship between the restraint and the other crimes, the distance the victims were moved while restrained, and the time which passed between the acts of restraint and the other crimes make this clear each of the restraint crimes on May 10 and June 29 were based upon the exact same two incidents, occurred in exactly the same place and during the same time, for the same purpose or objective – to facilitate the burglary and robbery. None of the restraints was for any other purpose, nor were the victims moved any significant distance over any period

of time.

The appellant submits that *Korum*, *supra*, remains the controlling authority in spite of *Berg*. In that case, the defendant was charged with "home invasion" robberies during which the victims were bound and one victim was moved from a house to another location for the purpose of facilitating the robberies. 120 Wn. App. at 689, 707. This Court found the restraint used was "incidental" to the robberies and thus did not support separate convictions for restraint crimes because:

(1) The restraints were for the sole purpose of facilitating the robberies--to prevent the victims' interference with searching their homes for money and drugs to steal; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

*Korum*, 120 Wn. App. at 689, 707.

Here, just as in *Korum*, the restraint of Mr. and Mrs. Fernandez on May 10 and Mr. Yu, Ms. Moo, Ms. Eng and A.E. were solely for the purpose of facilitating the robbery and burglary. No one was transported outside or away from the home and the restraints did not themselves create an independent danger.

Indeed, unlike in *Korum*, no one was ever transported away from the home during the incident. These facts further illustrate that the restraint used in the two incidents was completely incidental to the robbery and burglary and insufficient to support separate convictions for "restraint" crimes.

There was no "independent purpose" for restraining the victims, either with the gun or with the physical restraints. As a result, the restraints were not separate, independent crimes but rather incidental to the crimes of robbery and burglary with which Azariah was separately charged and convicted.

Further, because the unlawful imprisonment counts included six separate firearm enhancements which were ordered to run consecutively, additional amendment to the sentence to remove that "flat time" is required.

This Court should reverse, dismiss the separate convictions for the six counts of unlawful imprisonment, and order resentencing based upon the corrected number of convictions and enhancements.

7. **IN THE ALTERNATIVE, THE CONVICTIONS FOR ROBBERY AND UNLAWFUL IMPRISONMENT CONSTITUTE THE SAME CRIMINAL CONDUCT FOR EACH RESPECTIVE ALLEGED VICTIM**

"Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a); *State v. Williams*, 135 Wn.2d 365, 367, 957 P.2d 216 (1998). The test for determining same

criminal conduct is objective and "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Whether one crime furthered the other is relevant to determining objective intent. *Burns*, 114 Wn.2d at 318.

At sentencing, Azariah's counsel argued the unlawful imprisonment and robbery and burglary charges "merged" although counsel continually phrased her motion as one for merger, rather than for a finding of same criminal conduct, the record establishes it was for the later as well, although the argument and court's ruling concentrated on the merger argument.

Both the robbery and the unlawful imprisonment charged in this case for each alleged victim involved the same time and place. For each victim, the two alleged incidents occurred either on May 10 or June 29, 2012. For each victim, both incidents occurred inside either the Fernandez or Yu residence.

The only remaining question is whether the crimes involved the same criminal intent for each alleged victim. "Intent," as used under RCW 9.94A.589(1)(a), "is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime." *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990),

rev. denied, 114 Wn.2d 1030 (1990). "The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next." *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

"[I]f one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

As noted *supra* regarding merger, for each individual, the robbery and unlawful imprisonment involved the same criminal intent because the unlawful imprisonment furthered the robbery. The analysis of what constitutes the "objective criminal intent" turns on whether the crimes are linked, whether the objective substantially changed between the crimes, whether one crime furthered another; and whether both crimes were part of the same scheme or plan. *Burns, supra*. Here, the evidence supported that the unlawful imprisonment and robbery had the same objective criminal intent. The unlawful imprisonment clearly was for the purpose of furthering the robbery of Mr. Fernandez, Mrs. Fernandez, Ms. Moo, Mr. Yu and Ms. Eng. See *State v. Dunaway* 109 Wn.2d 207, 217, 743 P.2d 1237, 749 P.2d 160 (1987) (kidnapping and robbery involved the same objective intent of robbery, and the kidnapping furthered the robbery).

Because there was no substantial change in the nature of the criminal

objective, and the time and place were the same for each victim. The robbery and unlawful imprisonment charges constitute the same criminal conduct for the respective victims for purposes of calculating Azariah's offender score. This Court should reverse his sentence and remand for resentencing to count the relevant offenses as the same criminal conduct.

**F. CONCLUSION**

Azariah Ross respectfully requests that the court find that prejudicial errors were committed below such that his convictions must be reversed and his case remanded for further proceedings. In the alternative, this matter must be remanded for resentencing in accordance with the arguments presented above.

DATED: November 9, 2016.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in dark ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Azariah Ross

# CERTIFICATE OF SERVICE

The undersigned certifies that on November 9, 2016 that this Appellant's Opening Brief was mailed to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed to the following:

Ms. Kathleen Proctor Deputy Prosecuting Attorney 930 Tacoma Ave. S, Rm 946 Tacoma, WA 98402-2171 <a href="mailto:Pcpatcecf@co.pierce.wa.us">Pcpatcecf@co.pierce.wa.us</a>	Mr. David Ponzoha Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 9, 2016.



PETER B. TILLER

## TILLER LAW OFFICE

**November 09, 2016 - 4:44 PM**

### Transmittal Letter

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